STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 258573 Oakland Circuit Court
CHRISTOPHER CLAY HENRY, Defendant-Appellant.	LC No. 2003-188141-FC

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b, and five counts of second-degree criminal sexual conduct MCL 750.520c, arising out of his alleged sexual abuse of four of his children. Following a jury trial, he was convicted of a single count of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(i), and acquitted of all remaining counts. He was sentenced to one to fifteen years' imprisonment. He appeals by right. We affirm.

Defendant first argues that the prosecutor was improperly allowed to elicit testimony that he was fired from two jobs and did not leave the family home voluntarily. Defendant contends that this testimony was improper character evidence, inadmissible under MRE 404(b). Because defense counsel objected to the prosecutor's cross-examination on this ground at trial only on the basis that the prosecutor was mischaracterizing defendant's direct examination testimony, we conclude that this issue was not preserved for appeal. An objection to evidence on one ground at trial is insufficient to preserve an appellate attack on another ground. *People v Bulmer,* 256 Mich App 33, 35; 662 NW2d 117 (2003). Therefore, our review is limited to plain error affecting defendant's substantial rights. MRE 103(d); *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

The use of evidence for one purpose does not render it inadmissible for other purposes. *People v Sabin (After Remand),* 463 Mich 43, 56; 614 NW2d 888 (2000). A defendant's testimony on direct examination may open the door to cross-examination regarding a matter without implicating MRE 404(b). *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999). Here, the record reflects that the challenged cross-examination was brief and responsive to matters defendant raised on direct examination. Defendant has not established a plain error.

Next, defendant argues that the prosecutor engaged in misconduct in her remarks during closing argument. But defendant did not object to the prosecutor's remarks regarding the children's mother during closing and rebuttal arguments, and defendant has failed to establish the requisite outcome-determinative plain error to warrant relief. *People v Schutte*, 240 Mich App 713, 720-722; 613 NW2d 370 (2000). Nor has defendant established that the trial court abused its discretion in denying his motion for mistrial based on the prosecutor's cross-examination of one of his character witnesses. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). It was reasonable for the trial court to conclude that its instruction to strike the prosecutor's question would cure any prejudice. *Id.* at 581-582. A jury is normally presumed to follow its instructions. *Id.* at 581; *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Next, defendant argues that the trial court improperly qualified Amy Allen as an expert witness in the area of general characteristics of children who might be sexually abused. We disagree. The trial court adequately performed its gatekeeping function when qualifying Allen as an expert based on her training and experience. MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783; 685 NW2d 391 (2004). Additionally, MRE 702 does not preclude a witness from testifying about relevant behavioral traits. See *In re Noecker*, 472 Mich 1, 11-12; 691 NW2d 440 (2005).

Further, we are not persuaded that Allen's testimony exceeded the bounds of relevant or reliable testimony in the area of child sexual abuse. *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995); see also *Lukity, supra* at 500. With regard to defendant's newly raised claim that the prosecutor improperly elicited testimony from Allen to bolster the children's credibility, we hold that defendant has failed to establish a plain error. MRE 103(d); *Carines, supra* at 763. The record indicates that the prosecutor's questioning about Allen's relationship with the prosecutor's office, as a forensic interviewer for Care House, was relevant to whether she was a biased witness. *People v Layher*, 464 Mich 756, 762-763; 631 NW2d 281 (2001), citing *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984).

Next, defendant argues that defense counsel's failure to present an expert witness to counter Allen's testimony constituted ineffective assistance of counsel. Because the trial court failed to hold a *Ginther*[1] hearing on this issue, our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). A claim of ineffective assistance of counsel is generally a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). To establish ineffective assistance of counsel, a defendant must establish both deficient performance and prejudice. *Id*. at 485-486. A defendant claiming ineffective assistance of counsel must overcome a presumption that the challenged action could have been sound strategy. *Id.* at 485. "A sound strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgment." *Id.* at 486. Defense counsel's words and actions before trial and at trial

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

are the most accurate evidence of the defense strategy and theories. *Id.* at 487. The failure to call a witness constitutes ineffective assistance of counsel only if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In the case at bar, the record indicates that on cross-examination defense counsel elicited from Allen that children may lie about sexual abuse in divorce situations. This was consistent with the defense theory. Defense counsel's decision not to produce a defense expert to testify in this and other areas Allen addressed was a matter of trial strategy. Defense counsel's testimony would have been essential for defendant to overcome the presumption that defense counsel's failure to call an expert witness was unsound strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Because defendant failed to make an offer of proof regarding defense counsel's proposed testimony or strategy, the trial court properly denied defendant's request for a *Ginther* hearing. Defendant did not establish any area where factual development would advance his position that defense counsel's performance fell below an objective standard of reasonableness. Defendant's motion to remand filed in this Court had this same deficiency. Limiting our review to the record, the trial court properly rejected defendant's claim of ineffective assistance of counsel.

Defendant next argues that he is entitled to a new trial on the one count of which he was convicted because the trial court gave an inadequate unanimity instruction. We conclude that defendant waived any challenge to the verdict form by affirmatively approving the verdict form that was given to the jury. A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). But defendant's failure to object to the trial court's jury instructions qualifies only as a forfeiture, permitting review under the plain error doctrine. *Carines, supra* at 763. We conclude that defendant has not established plain error requiring reversal.

Jury instructions are examined as a whole to determine if they adequately protect a defendant's rights. *People v Grayer*, 252 Mich App 349, 352; 651 NW2d 818 (2002). A defendant has a right to a unanimous verdict under Const 1963, art 1, § 14. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). To protect this right, a trial court has a duty to properly instruct the jury regarding unanimity. *Id.* at 511. Where there is evidence of multiple acts to establish a single charged offense, a general unanimity instruction will be adequate "unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant' guilt." *Id*. at 524.

Here, however, the prosecutor charged two counts of second-degree criminal sexual conduct with respect to one of defendant's children. Each charge was based on a materially distinct act. Count V alleged an intentionally touching of the victim's breasts and Count VII alleged an intentionally touching the victim's genital area. The trial court orally instructed the jury that Count V was the breast-touching incident, and Count VII was the genital-touching incident. Defense counsel specifically agreed to the verdict form that identified Count V and Count VII by the child's name and referred the jury to the trial court's instructions. Each juror was furnished a written copy of the trial court's instructions, which state that Count V was the breast-touching incident and Count VII was the genital-touching incident. Consequently, the

jury received clear instruction regarding each alleged charge of second-degree criminal sexual conduct and the factual allegation that supported each charge. There is no evidence that the trial court's instructions confused the jury.

The prosecution concedes on appeal that it transposed the count numbers of these two distinct charges in its closing argument to the jury. The prosecutor identified Count V as an incident in which the victim, while sick in bed and under the age of 13 years, was touched by defendant all over her body and "specifically he touched her vagina." The prosecutor identified Count VII as an incident in which defendant, while accusing the victim of stuffing her bra, touched her breasts. But the trial court specifically instructed the jury that, "You must take the law as I give it to you," and if a lawyer says anything different, "you follow what I say." Further, the court instructed the jury that a lawyer's statements are not evidence and that the jury should only accept things a lawyer says "that are supported by the evidence or by your own common sense and general knowledge." There is nothing in the record to overcome the presumption that the jury followed the trial court's instructions. *Graves, supra* at 486.

The trial court instructed the jury orally and in writing regarding the presumption of innocence, burden of proof, and reasonable doubt. The jury was also instructed that its verdict must be unanimous. The trial court's instructions read as a whole adequately protected defendant's rights. *Grayer, supra* at 352. Accordingly, we conclude that defendant has not established plain error based on the trial court's failure to the give a more specific unanimity instruction. *Carines, supra* at 763.

Finally, we reject defendant's argument concerning his sentence based on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant argues that the trial court engaged in impermissible judicial fact finding in scoring 25 points for Offense Variable (OV) 13. The instructions for OV 13 provide that 25 points are to be scored if an offense is part of pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). The trial court ruled, "I'm satisfied that the jury, in regards to [the victim], did find the one touching and as a result of finding her truthful, I'll accept the other touching as well to comply with 13." Defendant contends that had OV 13 been scored at zero points, the trial court would have been limited to an intermediate sanction, including up to one year in jail. See MCL 769.31(c); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

In *Blakely, supra*, the United States Supreme Court reaffirmed its holding in *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004), our Supreme Court determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. In *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005), this Court held that it was bound to follow *Claypool*. Although our Supreme Court has granted leave to appeal in *Drohan, supra*, 472 Mich at 881 (2005), to consider this issue, the Court has not yet decided *Drohan*. Thus, based on the current state of the law, this Court is bound by *Claypool*. Therefore, the trial court correctly determined that it could rely on the trial evidence to factually support its score. *Id.*

Because evidence in the record supported the trial court's scoring, we find no abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Further, because the minimum sentence imposed here was within the appropriate guidelines recommended range, this Court must affirm defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

We affirm.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello